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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services	CC Docket No. 96-152

AT&T CORP. COMMENTS ON FURTHER NOTICE OF PROPOSED RULEMAKING

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SUMMARY

The Commission's First Report and Order in this proceeding concludes that "a BOC engaged in the provision of electronic publishing is subject to section 274 only to the extent that it controls or has a financial interest in the content of the information being disseminated over its basic telephone services." (¶ 242).

AT&T endorses the FNPRM's proposal that if a BOC has the ability to "limit the types of information to which its gateway connects," it should be deemed to control the information transmitted over its basic telephone services. However, the Commission should not require a BOC to have an ownership interest in information transmitted via its basic telephone service in order to find that the BOC "controls" that information.

The FNPRM's proposed definition of "financial interest" also focuses on whether a BOC owns information, and thus is far too narrow. A BOC plainly would have a financial interest in information if it receives royalties for directing users of its "gateway" service to a particular web site or on-line service, or engages in other arrangements by which it receives some form of remuneration based on the specific information its customers access via its gateway.

AT&T supports the Commission's proposals implementing § 274(b)(3)(B)'s requirement that a BOC and its separated affiliate or electronic publishing joint venture "carry out transactions ... pursuant to written contracts or tariffs that are filed with the Commission and made publicly available." In addition, the FNPRM

correctly concludes that § 274(d) requires BOCs to conduct transactions covered by that section pursuant to tariffs.

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Pursuant to Section 1.415 of the Commission's Rules and the First Report and Order and Further Notice Of Proposed Rulemaking ("FNPRM") released February 7, 1997,[1] AT&T Corp. ("AT&T") submits these comments concerning the FNPRM's proposed implementation of § 274's separation requirements.

I. THE COMMISSION SHOULD MODIFY THE FNPRM'S PROPOSED DEFINITIONS OF "CONTROL" AND "FINANCIAL INTEREST"

The Commission's First Report and Order in this proceeding concludes that "a BOC engaged in the provision of electronic publishing is subject to section 274 only to the extent that it controls or has a financial interest in the content of the

[1] First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152, FCC 97-35, released February 7, 1997 ("FNPRM").

information being disseminated over its basic telephone services."[2] The FNPRM seeks comment on the meaning of the terms "control" and "financial interest" as they are used in this standard.

Control. The FNPRM correctly observes that the definition of "control" provided in § 274(i) is not an appropriate standard to measure a BOC's control over information. That section incorporates a definition promulgated by the SEC in the context of securities regulation, which turns on the possession of power to "direct or cause the direction of" a company's management and policies.[3] The § 274(i) definition is plainly too narrow to be applied in the instant context. A BOC could own information outright or possess other indicia of control without having any power to "direct" the entity that produced it.

The FNPRM seeks comment on whether "an ownership interest is required" in order for a BOC to be deemed to control information. While the possession of an ownership interest in information clearly would give a BOC the ability to exercise control over it, ownership is not a necessary criterion for control. For example, a BOC operating an Internet service that provides access to the World Wide Web could impose filters to prevent its customers from obtaining certain types of information or visiting certain web sites, in an effort to direct users toward specific sites or information services.

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2 Id., ¶ 242 (emphasis added); see also id., ¶ 49.

3 Id. (citing 17 C.F.R. § 240.12b-2).

There is thus no basis for the FNPRM's suggestion that an arbitrary percentage ownership threshold might be an appropriate measure of "control" over information.

Instead, AT&T endorses the FNPRM's proposal that if a BOC attempts to "limit the types of information to which its gateway connects," it should be deemed to control the information transmitted over its basic telephone services, and so must provide the relevant electronic publishing service via an affiliate or joint venture that complies with § 274.[4] The Commission's order in this proceeding permits BOCs to offer "gateway" services without utilizing a § 274 affiliate, but this exception to the section's separation requirements is narrowly drawn.[5] If a BOC attempts to exercise the power to determine what information its customers may access, then it cannot reasonably be deemed merely offer a "gateway."

Financial Interest. The FNPRM suggests that a BOC should be found to have a "financial interest" in information only if it "owns" or "has a direct or indirect equity interest" in it.[6] However, if a BOC possessed an equity interest in information, by definition it would also have an "ownership interest" in it. Thus, the FNPRM's proposed

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4 Id., ¶ 244. Many Internet and on-line service providers seek to limit their customers' access to certain information, the transmission or possession of which could be a violation of laws such as those prohibiting child pornography or hate crimes. AT&T would not oppose a Commission rule that permitted BOCs to establish these types of carefully tailored restrictions without being found to "control" the information transmitted via their gateway services.

5 FNPRM, ¶¶ 46-47.

6 Id., ¶ 245.

definition adds nothing to the "ownership" standard the FNPRM proposes as a definition of "control," which, as AT&T has shown above, is far too limited.

The ordinary meaning of the phrase "financial interest" extends to far more than ownership. A BOC plainly would have a financial interest in information if it receives royalties for directing subscribers to its "gateway" service to a particular Internet site or on-line service, or engages in other arrangements by which it receives some form of remuneration based on the specific information its customers access via its gateway. The Commission should not attempt exhaustively to catalog the wide variety of dealings that would give rise to a "financial interest" in information, because such arrangements -- like other aspects of § 274 -- will "involve a fact-specific analysis that is best-performed on a case-by-case basis."[7] Instead, the Commission should affirm that so long as a BOC's electronic publishing service truly serves only as a gateway, that service need not be provided via a § 274 affiliate or joint venture. However, if a BOC obtains a direct or indirect financial stake in any particular information accessible through its gateway, such as by obtaining royalties for directing customers to other web sites or information services by means of hypertext "links" from its home page, then its gateway service will be subject to § 274.[8]

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7 Id., ¶ 48.

8 The Commission's order in this proceeding expressly permits BOCs to establish hypertext links and other "navigational aids" linking their home pages to other web pages; however, the order nowhere permits a BOC to obtain a financial interest in those links by entering into arrangements by which it obtains royalties for encouraging its customers to access particular information. See id., ¶ 47.

The FNPRM also asks whether the Commission should establish a de minimis exception to the "financial interest" requirement, such as by permitting a BOC to have an interest in "only one percent of the content of the information" accessible through its electronic publishing services.[9] AT&T opposes the establishment of such an arbitrary threshold. As a preliminary matter, measuring the size of a BOC's financial interest according to the percentage of information it owned would reveal nothing about the importance of that information relative to other data available via a BOC's service, or the amount of revenue generated by that information. For example, a BOC could design a web page that focused customers' attention on a small set of links via graphics, sound or other devices, and also presented a long list of other links in small type at the bottom of the page.

More importantly, there is no practical way to define "one percent" of electronic information. That standard would mean something very different depending on whether it referred to number of hypertext links, size of files in bytes (graphics files are far larger than text files, and both types of information can be compressed), or number of words of text. It would also be necessary to define the set of data against which the proposed one percent figure would be measured. For example, the home page of a BOC's World Wide Web service theoretically would permit its subscribers to access all of the information on the Internet. One percent of all data available on the Internet would be an immense amount of information. Even measuring one percent of the data contained on a

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[9] Id., ¶ 246.

particular BOC's home page would be a daunting task, as web pages are linked to many other pages, the content of each of which changes constantly. Because a BOC could have significant incentives to engage in anticompetitive conduct even when it had a financial interest in a small percentage of the information available through its gateway service, the Commission should not adopt a de minimis exception to its "financial interest" standard.

II. THE COMMISSION SHOULD ADOPT THE FNPRM's PROPOSED INTERPRETATION OF SECTION 274(b)(3)(B)

Section 274(b)(3)(B) requires a BOC and its separated affiliate or electronic publishing joint venture to "carry out transactions ... pursuant to written contracts or tariffs that are filed with the Commission and made publicly available." The FNPRM seeks comment on what documents should be made publicly available and how, and on the meaning of the word "transaction" as used in that section.

AT&T supports the Commission's tentative conclusion that § 274(b)(3)(B) requires both contracts and tariffs to be made publicly available.[10] It would be wholly unreasonable to conclude that Congress mandated that BOCs and their § 274 affiliates or joint ventures conduct all their dealings with each other exclusively pursuant to tariffs or written contracts, but permitted them to withhold those contracts from public inspection. As the FNPRM recognizes, the fundamental purpose of § 274(b)(3)(B) is to deter BOCs from anticompetitive conduct such as offering facilities and services to their affiliates on more favorable terms than to competing entities or improperly subsidizing their affiliates'

[10] Id., ¶ 249.

operations.[11] Requiring that all transactions between BOCs and their § 274 affiliates be in writing and subject to public inspection both deters potential misconduct, and makes it possible for the Commission and competitors to detect such abuses if they do occur. Congress plainly intended that both contractual agreements and tariffed transactions be publicly available.

AT&T also endorses the FNPRM's proposal to adopt procedures for ensuring the public availability of § 274 contracts that are based on those imposed pursuant to § 272(b)(5) by the Commission's Accounting Safeguards Order[12] and the Commission's rules implementing § 211 of the Communications Act.[13] The FNPRM proposes to require that contracts covered by § 274(b)(3)(B) be available at each BOC's corporate headquarters, accompanied by a certification statement identical to that required for ARMIS reports. In addition, the Commission proposes to require BOCs to make a "detailed written description" of each transaction with a § 274 affiliate available on the Internet within ten days of that transaction.[14] Such a system will minimize the administrative burden on the BOCs, while permitting competing carriers ready access to the information § 274(b)(3)(B) is intended to provide them.

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11 Id.

12 Report and Order, Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, FCC 96-490, released December 24, 1996.

13 See FNPRM, ¶¶ 248-49.

14 FNPRM, ¶ 250.

The FNPRM proposes to adopt the same definition of the term "transaction" that the Commission adopted in the Accounting Safeguards Order.[15] That order held that § 272(b)(5)'s requirement that "transactions" between a BOC and its § 272 affiliate be "reduced to writing and available for public inspection" is triggered when a BOC and its affiliate reach agreement on terms and conditions for the transfer of facilities of services.[16] AT&T supports the adoption of the same definition of "transaction" under § 274(b)(3)(B).[17]

Finally, AT&T endorses the FNPRM's tentative conclusion that § 274(d)'s mandate that BOCs "shall provide network access and interconnections for basic telephone service to electronic publishers at just and reasonable rates that are tariffed (so long as rates for such services are subject to regulation)" requires BOCs to provide those

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15 Id., ¶ 251.

16 Accounting Safeguards Order, ¶ 124.

17 The FNPRM could be read to assume that the Accounting Safeguards Order limited § 272(b)(5) "transactions" to agreements concerning telephone exchange service, exchange access, unbundled elements, and facilities, as these are the only subjects mentioned in the FNPRM's proposed definition of that term. FNPRM, ¶ 251. However, the plain language of § 274(b)(3)(B) does not limit the subject matter of "transactions" in any respect, nor does § 272(b)(5). Indeed, the Accounting Safeguards Order expressly recognizes that the term "transaction" applies to dealings for goods and services beyond those discussed in the FNPRM. See Accounting Safeguards Order, ¶ 182 (holding that "sharing of in-house services" is a "transaction" that must be reduced to writing under § 272(b)(5)); see also Comments of AT&T Corp., p. 17 and Reply Comments of AT&T Corp., p. 17 in Public Notice, Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use Of Customer Proprietary Network Information And Other Customer Information, CC Docket No. 96-115, DA 97-385, released February 20, 1997.

services to their § 274 electronic publishing affiliates and joint ventures pursuant to tariffs, despite § 274(b)(3)(B)'s provision that all transactions shall be "pursuant to written contracts or tariffs." The Commission's interpretation is the only logical reading of § 274(d). There is no indication that Congress' use of the phrase "contracts or tariffs" in § 274(b)(3)(B) was intended to free BOCs from existing tariffing requirements, rather than simply to require a written contract for transactions not otherwise subject to tariffs. Even if it were otherwise plausible to construe § 274(b)(3)(B) as repealing existing tariffing requirements by implication,[18] § 274(d)'s specific requirements clearly control the former section's more general provisions.[19] Indeed, to read § 274(b)(3)(B) as exempting BOCs from otherwise applicable tariffing requirements would render § 274(d) surplusage.[20]

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18 Cf., e.g., County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation 502 U.S. 251, 262 (1992) ("[I]t is a cardinal rule that repeals by implication are not favored ....") (internal quotation and ellipses omitted).

19 Cf., e.g., Ohio Power Co. v. FERC, 954 F.2d 779, 784 (D.C. Cir.), cert. denied, 506 U.S. 981 (1992) ("[W]hen a conflict arises between specific and general provisions of the same legislation, the courts should give voice to Congress's specific articulation of its policies and preferences.").

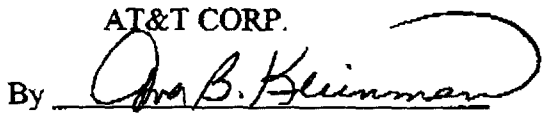
20 Cf., e.g., Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990) (recognizing canon of statutory interpretation that readings that nullify other provisions of the law should be avoided).

CONCLUSION

For the reasons stated above, the Commission's proposed rules should be modified prior to adoption.

Respectfully submitted,

AT&T CORP.

By 

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